

No. 12371

In the United States Court of Appeals
for the Ninth Circuit

F. E. THIBODO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion. Its reasons for its action are set forth in its judgment (R. 21-22).

JURISDICTION

This is an appeal from a judgment dismissing a complaint without leave to plead further. The judgment was entered June 20, 1949 (R. 20-22). Notice of appeal was filed July 27, 1949 (R. 23). The jurisdiction of the district court was invoked under 28 U. S. C. section 1346 (a) (2) (R. 2-3). The jurisdiction of this Court rests upon 28 U. S. C. section 1291.

QUESTIONS PRESENTED

1. Whether the fact that plaintiff was not made a party to a proceeding to condemn land which was sub-

ject to a lien to secure payment of street improvement bonds owned by him gives him the right to bring suit against the United States to recover the amount of the bonds, when (a) the United States did not have notice of his claim, (b) the city, which was under a duty to collect assessments to pay the bonds and to take numerous other steps to protect the bondholder and secure ultimate payment of the bonds, was made a party to the proceeding and (c) plaintiff does not contend that he did not have actual knowledge of the condemnation proceeding.

2. Whether plaintiff can assert ignorance of the condemnation proceeding while at the same time relying upon its pendency to excuse his failure to assert his lien within the time prescribed by the state statute.

STATUTES INVOLVED

The pertinent provisions of the Street Improvement Act of April 7, 1911, Cal. Stats. 1911, c. 397, p. 730, as amended, General Laws of California (Deering 1931), Act 8199, secs. 20, 20i, 22, 23, 37, 59, 60, 62, 63, 66, 67, 76, 76a; the California Code of Civil Procedure, sec. 330, and the California Civil Code, sec. 2911, are set out in the Appendix, *infra*, pp. 18-27.

STATEMENT

This is a suit instituted on November 23, 1948, against the United States to recover the principal sum, together with interest thereon, of improvement bonds issued by the City of National City, California, which it was alleged constituted first liens on certain lands which had been condemned by the United States and for which the plaintiff, owner of the bonds, was not compensated in the condemnation proceeding (R. 2-11). Upon a motion by the United States the complaint was dismissed (R. 11-12, 20-22). The facts as alleged in the complaint are as follows:

On August 24, 1931, the Treasurer of the City of National City issued street improvement bonds under the provisions of the Street Improvement Act of April 7, 1911, as amended (Cal. Gen. Laws (Deering 1931) Act 8199, p. 4519, *et seq.*, especially secs. 20, 59) to represent assessments made to pay the cost of constructing a sanitary sewer and levied against lands fronting on the improvement (R. 3-6). The principal of the bonds was payable in ten annual instalments, the first being due on January 2, 1932, and the last on January 2, 1941 (R. 5-6; see Cal. Gen. Laws (Deering 1931) Act 8199, secs. 60, 63). The bonds bore interest at the rate of 7% payable semi-annually and upon default of any payment of principal or interest were subject to an immediate penalty of 5% of the amount thereof, together with an additional penalty of 1% of the defaulted amount each month following the default (R. 5-8; see Cal. Gen. Laws (Deering 1931) Act 8199, secs. 60, 63). Under the statute the assessment constitutes a first lien on the lots until the bond issued for the payment thereof, together with accrued interest and penalties, if any, are paid (R. 3, 6; see Cal. Gen. Laws (Deering 1931) Act 8199, secs. 23, 63, 66). Nothing has ever been paid on the bonds, either of principal or interest (R. 6).

The complaint further alleged that on or about February 9, 1943, the United States instituted proceedings to condemn the lands which had been assessed to pay bonds owned by the plaintiff in the present case; that on or about the same date the United States filed a declaration of taking, thereby vesting title to the lands sought in the United States under the provisions of the Declaration of Taking Act of February 26, 1931, sec. 1, 46 Stat. 1421, 40 U. S. C. 258a; that an order of possession was made in pursuance thereof and thereupon the United States entered into possession of the property; that plaintiff here was not made a party to

the condemnation proceeding nor served with summons; and that final judgment has been entered and the awards disbursed without any compensation to plaintiff for his bonds (R. 3-4, 9).

The complaint here seeks judgment against the United States for a sum of money amounting to the total of the principal sums of plaintiff's bonds with interest thereon at the rate of 7% from August 24, 1931, to February 9, 1943 (which is alleged to be less than the value of the property, R. 8-9), a decree that each bond constitutes a separate lien on the property described until paid, a declaration of the rights of the parties, costs and such general, other and further relief as may follow in the due course of law (R. 10). The United States moved to dismiss the complaint on various grounds and, in the alternative, moved to strike the complaint and for a more definite statement in certain particulars (R. 12-17). After hearing argument of counsel (R. 33-41), the district court determined (1) that plaintiff as a bondholder was a proper but not a necessary party to the condemnation proceeding, (2) that a bond register maintained in the office of the county treasurer as required by the California Streets and Highway Code, sec. 6400, *et seq.* (see Cal. Gen. Laws (Deering 1931) sec. 66) did not constitute either actual or constructive notice to the United States of plaintiff's claims and (3) that the complaint does not state sufficient facts to constitute a cause of action against the United States (R. 21-22). Accordingly, an order was entered dismissing the complaint without leave to plead further (R. 22). This appeal followed (R. 23).

ARGUMENT

It is not clear either from the complaint or from plaintiff's brief upon what theory he seeks to recover in this suit against the United States. However, by process of elimination it appears that there is only one ground upon which it could possibly rest. The United States is,

of course, under no obligation to pay the bonds.¹ And, although the complaint asked for a decree that the bonds are a lien on the property, it is clear that any attempt to secure such an adjudication or to obtain foreclosure of the lien would constitute an attempt to sue the United States without its consent. *United States v. Alabama*, 313 U. S. 274, 282-283 (1941).² The jurisdiction of the court below was sought to be invoked under 28 U.S.C. sec. 1346(a) (2), formerly the Tucker Act (R. 2-3). Such jurisdiction could be supported only upon a theory that plaintiff is seeking just compensation for the taking of his interest in the property. Although the complaint is indefinite and ambiguous, the references to the condemnation proceedings indicate that the theory is that as a result of institution of condemnation proceedings, the filing of a declaration of taking and the entry of the United States into possession there was a taking of the property but that plaintiff was not bound by the judgment fixing the amount of compensation and ordering it distributed among the persons entitled thereto because he was not made a party thereto nor was he served with summons therein. Assuming this to be plaintiff's theory, we submit that the court below correctly dismissed plaintiff's complaint.

I

The Fact That Plaintiff Was Not Made a Party to the Condemnation Proceeding Does Not Give Him the Right to Maintain This Suit

The California Code of Civil Procedure, sec. 1244, provides that the complaint in condemnation shall contain “* * * the names of all owners and claimants, of

¹ The Street Improvement Act of 1911, as amended, Cal. Gen. Laws (Deering 1931), Act 8199, contains no provision for personal liability on the part of owners of lands assessed to pay improvement costs.

² Moreover, if this be a suit to enforce the lien, it is barred by the California statutes. Cal. Civ. Code, sec. 2911; Cal. Code Civ. Proc. sec. 330.

the property, if known, or a statement that they are unknown, who must be styled defendants.”³ The trial court held that plaintiff, while a proper party, was not a necessary party to the condemnation proceeding (R. 21). In his brief on appeal, plaintiff cites no cases tending to show that he was a necessary party to that proceeding, but refers (Br. 11-13) to the provisions of the California Street and Highways Code making the recording of street assessments in the office of the Superintendent of Streets notice to all persons of the contents thereof and, apparently on the assumption that this makes him a holder of an “interest of record” (see Br. 13), relies upon cases stating that persons having certain interests in land condemned are necessary parties to the proceeding and cases stating that when property is taken for public use without compensation suit may be brought against the United States to recover its value (Br. 13-15).⁴

³ The pleadings and practice in federal condemnation proceedings follow local law. Act of August 1, 1888, sec 2, 25 Stat. 357, 40 U.S.C. sec. 258.

⁴ None of the cases cited (Br. 13-15) presented a recovery by a plaintiff in a situation analogous to that here involved. *Jacobs v. United States*, 290 U.S. 13 (1933); *Sponenbarger v. United States*, 101 F. 2d 506 (C.C.A. 8, 1939), reversed 308 U.S. 256; *Tilden v. United States*, 10 F. Supp. 377 (W.D. La. 1934); *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884); and *Phelps v. United States*, 274 U.S. 341, 343 (1927), all presented cases where no condemnation proceedings were instituted and owners or lessees recovered for takings under the Tucker Act. In *Silberman v. United States*, 131 F. 2d 715 (C.C.A. 1, 1942) the lessee was a party to the condemnation proceedings and the issue related to his right to present evidence of value. In *Stubbs v. United States*, 21 F. Supp. 1007 (M.D. N.C., 1938), although the court held that a life tenant and remaindermen who were not parties to a condemnation proceeding could sue under the Tucker Act, recovery was denied because not brought within the statutory time. This case has no tendency to support plaintiff's claim that a holder of an assessment bond under California law is a necessary party. In *United States v. Parcel of Land, Etc.*, 54 F. Supp. 901 (E.D. Va., 1944), the trustee in a deed of trust and holder of a debt was allowed to intervene without opposition in a condemnation proceeding with the statement (p. 904) that “it would seem” that they are entitled to be parties to the cause on the record.

To determine whether the failure of the United States to make plaintiff a party to or to serve him with notice of the condemnation proceeding entitles him to bring suit against the United States for a taking of his property without just compensation, it is necessary to examine the state statutes regarding street improvements and the bonds issued to represent assessments to pay the costs of such improvements.

A. Section 23 of the Street Improvement Act of 1911 does not make plaintiff an owner of record.—The Street Improvement Act of 1911, as amended, under which plaintiff's bonds were issued, provides that the expenses incurred for work authorized by the act "shall be assessed upon the lots and lands fronting thereon * * *; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work." Cal. Gen. Laws (Deering 1931), Act 8199, sec. 20.⁵ Section 23 provides that the assessment (together with a warrant authorizing the contractor making the improvements to demand and receive the assessments and a diagram of the property affected by the improvement, showing each lot and parcel therein (see secs. 20i, 22)) shall be recorded in the office of the superintendent of streets, and

* * * When so recorded, the several amounts assessed shall be a lien upon the lands, lots or portion of lots assessed, respectively, and such lien shall so continue until it be discharged of record.
* * * and from and after the date of said recording of any warrant, assessment and diagram, all persons shall be deemed to have notice of the contents thereof.

⁵ Inasmuch as plaintiff's bonds were issued in August 1931, reference will be made to the 1931 edition of the General Laws insofar as the provisions of that date are applicable. The Street Improvement Act of 1911 has subsequently been amended and now appears in the Street and Highway Code.

Section 37 provides as follows:

The superintendent of streets shall keep a public office in some convenient place within the municipality, and such records as may be required by the provisions of this act. The records so kept and signed by him, shall have the same force and effect as other public records, and copies therefrom duly certified, may be used in evidence with the same effect as the originals. The said records shall, during all office hours, be open to the inspection of any person wishing to examine them, free of charge.

It is on the two latter sections that plaintiff relies (Br. 12) for notice to the United States of its bonds. However, these sections relate only to the record of the assessment. When bonds are issued to represent the assessments, a register of the bonds, showing the series, number, date, amount, rate of interest, payee and indorsees of each bond, is kept in the office of the city treasurer. There is no statute making this register constructive notice of its contents and, as the trial court held (R. 21-22) the register "is not such a public record as constitutes either actual or constructive notice to the United States of America of the existence of the claims of this complainant arising out of the ownership of Public Improvement Street Lien Bonds." Consequently, as will appear from further examination of the provisions of the Street Improvement Act of 1911 relating to the bonds, the United States discharged any obligation arising out of the statutory notice of the assessments by making the city a party to the condemnation proceeding (R. 8).

B. *It was sufficient that the city was made a party to the condemnation proceeding.*—The Street Improvement Act imposes on the city the duty of collecting the assessments to pay the bonds, placing them in a separate fund in the city treasury and paying them out on de-

mand of the bondholder. See *Bryant v. Commissioner of Internal Revenue*, 111 F. 2d 9, 15, 17, 19 (C.C.A. 9, 1940). The city treasurer is required to send notices of the amount due to the owners of property assessed 15 days before each interest or principal payment is due (Cal. Gen. Laws (Deering 1931) Act 8199, sec. 62), to put all assessments collected in a special fund to be kept by him (Id. sec. 60), to add and collect penalties for delinquent payments (Id. sec. 62), to pay out assessments collected to the bondholder upon demand (Id. sec. 60) and to advertise and sell the property assessed for delinquent payments upon demand by the bondholder (Id. secs. 67-75). He is also required to certify delinquent payments to the city or county tax collector (whichever collects the taxes of the particular municipality) and the latter are required to attach notice of the delinquency to the municipal tax bill (Id. sec. 76). With one exception,⁶ all rights and benefits that the bondholders possess are acted upon for them by the city. The only acts required of the bondholder to collect his money are to request payment from the city treasurer after the instalment due date and to request the treasurer to sell the property when there is a default in payment. In fact, as this Court pointed out in *Bryant v. Commissioner of Internal Revenue*, 111 F. 2d 9, 15, 17 (1940), the all important factor in making improvement bonds valuable is the city's obligation to collect the assessments, place it in a special fund and pay it on demand to the bondholder. If the treasurer fails to carry out his duties to the bondholder the latter may compel him to do so by mandamus. *Oakland S. I. Bond Co. v. Fitzmaurice*, 47 Cal. App. 258, 190 Pac. 499 (1920) ; Cf. *Fox v. City of Pasadena*, 78 F. 2d 948, 950 (C.C.A. 9,

⁶ In addition to the right to have the city treasurer sell the property to satisfy the lien, the bondholder has the right by way of a separate, distinct and cumulative remedy to foreclose the bond lien. Cal. Gen. Laws (Deering 1931) Act 8199, sec. 76a.

1935). As was said in the *Fitzmaurice* case, "A street assessment is a contract, and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of the contract. In effect, the bond creates a power of sale, whereby its holder may enforce the lien of the assessment against the property described in the bond. The city treasurer is thereby made a special agent of the parties concerned, with authority to execute the power according to its terms, as found in the statute under which the bond was issued." And, when the treasurer misappropriates the assessment money collected, the city, as trustee for the bondholder, may sue the surety on the treasurer's official bond to recover the sum misappropriated. *Municipal Bond Co. v. Riverside*, 4 Cal. App. 2d 442, 41 P. 2d 215 (1935). If the city is trustee in relation to the bondholder, it was sufficient that the city was a party to the proceedings and it was not necessary to serve notice on the bondholders. Cf. *White River Bridge Corporation v. State*, 192 Ark. 485, 92 S.W. 2d 856, 858 (1936).

C. Moreover, one having actual knowledge of the pendency of a condemnation proceeding is estopped to bring a suit to recover compensation for the taking of his property in the condemnation proceeding on the ground that he was not served with a notice thereof.—Plaintiff did not allege in his complaint, nor does he contend here, that he did not know of the condemnation proceeding in time to have asserted his claim in that proceeding. He contends only that "the right to intervene is not absolute" and "even though an owner of an interest has knowledge of pending litigation, he is under no obligation to intervene" (Br. 19). Whatever may be the rule as to intervention in other types of cases (see Br. 19), one who knows that a proceeding is pending to condemn property in which he has an interest cannot stand by and wait until the case has

proceeded to judgment and the compensation awarded has been paid out to other persons and then bring suit to require the condemnor to pay for his interest in addition to the value of the property already paid.

That this is true is evident from a consideration of the nature of condemnation proceedings and the nature of the rights of claimants such as the plaintiff. A condemnation proceeding is a proceeding *in rem*. It is a taking, not of the rights of designated persons in the property, but of the property itself. All previously existing estates or interests in the land are extinguished. "Ordinarily an unqualified taking in fee by eminent domain takes all interests and as it takes the *res* is not called upon to specify the interests that happen to exist. * * * such an exercise of eminent domain founds a new title and extinguishes all previous rights." *Duckett & Co. v. United States*, 266 U. S. 149, 151 (1924); *Treasure Co. v. United States*, 169 F. 2d 437, 439-440 (C.A. 9, 1948), certiorari denied 335 U. S. 891; see *Weeks v. Grace*, 194 Mass. 296, 299-300, 80 N. E. 220 (1907). Since condemnation proceedings are actions *in rem*, the jurisdiction of the court rests, not upon notice to individual owners, but upon the power of the court over the *res*. See *Pennoyer v. Neff*, 95 U. S. 714, 727 (1877). Jurisdiction over the *res* is conferred upon the district court where the property is located by the Act of August 1, 1888, sec. 1, 25 Stat. 357, 40 U. S. C. sec. 257.⁷ Thus, the district

⁷ It may be noted that it is apparent from the provisions of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258a, that the jurisdiction of the court over the property is not dependent upon notice to individual owners. A declaration of taking may be filed in any condemnation proceeding instituted by the United States "*with the petition* or at any time before judgment." (Italics supplied). It is also provided that "upon the filing of a declaration of taking" the court shall have the power to fix the time and terms on which possession shall be surrendered. Thus, neither the vesting of title nor the power of

court had jurisdiction of the condemnation proceeding and the final judgment entered therein confirming the title which had vested in the United States by the filing of a declaration is valid.⁸

However, the Fifth Amendment provides that private property shall not be taken for public use without just compensation. "The principle that the owner of an estate or interest in property condemned is entitled to compensation is not open to dispute. * * * The right to compensation carries with it the right to be heard upon the important question of the value of the property taken and the damages caused." *Silberman v. United States*, 131 F. 2d 715, 717 (C.C.A. 1, 1942). "With respect to the compensation for the taking, however, due process requires that the owner be given opportunity to be heard, upon reasonable notice of the pending proceedings." *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 284-285 (1925). However, an owner of an interest less than the fee does not have an absolute right to present evidence of fee value when that is the estate taken. His only interest is that there will be sufficient funds to compensate him for the value of his interest. *Silberman v. United States*, 131 F. 2d 715, 717-718 (C.C.A. 1, 1942).

the court to enter orders of possession depends upon notice. Cf. *City of Oakland v. United States*, 124 F. 2d 959 (C.C.A. 9, 1942), certiorari denied 316 U.S. 679. Moreover, *ex parte* orders of possession may be found in cases where the declaration of taking is not used. See, e.g., *Brett v. United States*, 86 F. 2d 305, 306 (C.C.A. 9, 1936), certiorari denied 301 U.S. 682; *Palisade v. Irrigation Dist.*, 85 Colo. 57, 60, 273 Pac. 646 (1928); cf. *Schrader v. Third Judicial District Court*, 58 Nev. 188, 199-200, 73 P. 2d 493 (1937) ("the requirement in our statute for the giving of notice before property sought to be condemned can be occupied, is a precautionary step, which the statute need not require in condemnation proceedings.")

⁸ In fact, as pointed out, *supra*, pp. 4-5, it can only be on the theory that plaintiff's lien was extinguished and his interest in the property thereby taken without compensation to him that he can assert the right to maintain the present suit.

Consequently, if the condemnation award exceeds the value of such an interest, the owner thereof may not complain if he is given notice of the proceedings in time to assert his claim against the award. This is particularly true in the case of lien claimants who have no actual estate or interest in the property, but only a right to proceed against it to satisfy their claims. As was held in *St. Paul v. Certain Lands in St. Paul*, 48 F. 2d 805, 807 (C.C.A. 8, 1931), a tax lienor has no such interest in the property as would permit it to appeal from a condemnation award which exceeded the amount of its tax claim. And, even though a mortgage or tax lienor is not made a party to a condemnation proceeding prior to judgment, the condemnor is entitled to be protected by having the liens paid out of the fund deposited in court. *North Coast Ry. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853 (1909). It is apparent, therefore, that a lien claimant is not a "necessary party" to a condemnation proceeding and that he is amply protected if he is given an opportunity to assert his claim at some stage of the proceeding.

The California Code of Civil Procedure, sec. 1246, specifically authorizes anyone claiming an interest in the property described in the complaint to intervene. Consequently, one who knows there is a proceeding pending to condemn land in which he has some claim has the opportunity to assert his claim in the proceeding. Plaintiff suggests no reason why he should be permitted to wait until judgment has been entered and the award disbursed to other persons and then bring a suit for compensation for his interest on the theory that it was taken in the condemnation proceeding without service of notice on him. Therefore, if plaintiff here had actual knowledge of the condemnation proceeding he is estopped now to rely upon the fact that

he was not served with notice as giving him a right to bring this suit against the United States. As was said in *State v. Superior Court*, 80 Wash. 417, 424-425, 141 Pac. 906 (1914):

It is asserted, and is not denied, that the relator lessees were present in the court-room and had knowledge and notice of the proceeding. They knew the statute law of the state. The object of the law is to give notice to those having a disclosed interest. It does not deny the right of those having an undisclosed interest to be heard at any stage of the proceeding. The object of notice is notice, and the relator lessees could have had no more notice and it would have been no more incumbent upon them to assert their interest in the original proceeding or under the statutory provision for apportionment of the award had they been made parties to the action and been served with a formal written notice of the hearing.

See also *Joo v. United States*, 60 C. Cls. 850, 855-856 (1925); *Peach Bottom Railway Co. v. McAlister*, 7 Pa. Super. Ct. 574 (1898).⁹

II

Plaintiff Cannot Assert Ignorance of the Condemnation Proceeding While at the Same Time Relying Upon Its Pendency to Excuse His Failure to Assert His Lien Within the Time Prescribed by State Law

The time within which the bondholder might himself bring judicial proceedings to foreclose the lien was limited to four years after the due date of the last installment on the bond or the last principal coupon attached thereto. Cal. Gen. Stats. (Deering 1931) Act 8199, sec.

⁹ One ground of the Government's motion to dismiss the complaint was that plaintiff had actual notice of the condemnation proceeding (R. 12). If it is concluded that the plaintiff is not required to allege lack of knowledge in his complaint, the factual question whether he did have such knowledge will then have to be determined at a trial on the merits. Cf. R. 37-38.

76a. That time would have expired as to plaintiff's bonds on January 2, 1945. In 1931 when plaintiff's bonds were issued there was no statutory limitation on the time within which the bondholder might request the city treasurer to enforce the assessment lien by selling the property assessed. In 1945 the state legislature amended the California Civil Code (sec. 2911) and added a section to the California Code of Civil Procedure (sec. 330) by providing that the treasurer or other public official having power to sell property to satisfy the lien on request of the bondholder may do so within four years after the due date of the last installment or last principal coupon or prior to January 1, 1947, whichever is later, but not thereafter and that the lien is extinguished by expiration of such time (see Appendix, *infra*, pp. 26-27). These 1945 amendments are applicable to bonds issued prior thereto. *Rombotis v. Fink*, 89 C.A. 2d 378, 201 P. 2d 588 (1948). Since the four-year period prescribed by the amendments expired as to plaintiff's bonds on January 2, 1945, he had until January 1, 1947, the later of the two dates, to request the city treasurer to enforce his lien. Thereafter all remedies for enforcement of plaintiff's lien were barred and by express provision of the statute his lien was extinguished.

Plaintiff contends, however, that since title to the property had vested in the United States on February 9, 1943, when a declaration of taking was filed, he could not enforce the lien thereafter (Br. 16-18). But plaintiff occupies inconsistent positions. He cannot contend, as he does (Br. 18), that because of the condemnation proceedings he was confronted with a situation where he could not foreclose his bonds and at the same time excuse his failure to present his claim in the condemnation proceedings. He should not be permitted to rely upon the condemnation proceeding as an excuse for sleeping on

his rights and at the same time deny knowledge of the proceeding. The least that should be required of him is that he assert the claim in the condemnation proceeding before the expiration of the time allowed for enforcing the lien under the statute. And if he had done so he would have been protected from the running of the statute. See *Ross v. Gates*, 183 Mo. 338, 81 S.W. 1107 (1904). Plaintiff contends, however, that the six-year period of limitations prescribed by the federal statute (28 U.S.C. sec. 2401) for the bringing of suits against the United States is controlling over the state statute and that the taking of his interest occurred on February 9, 1943, less than six years before this suit was brought.¹⁰ This argument overlooks the fact that whatever plaintiff's rights in the property may have been, the only basis for any right to bring the present suit against the United States lies in the fact that he was not served with notice of the condemnation proceeding. Otherwise, he would be precluded by the judgment in that case. As we have said above, he may not rely upon the condemnation proceeding to preserve his lien despite the state law and at the same time rely upon the fact that he was not given notice of the proceeding to give him a right of suit against the United States.

¹⁰ One ground of the motion to dismiss was that this action was barred by the Federal Statute of Limitation (R. 12). The allegations of the complaint are that the condemnation proceedings were instituted and declaration of taking filed "on or about" February 9, 1943, and that "thereupon" the United States entered into possession (R. 9). Apparently anticipating a contention that there had been an earlier taking by entry into possession, plaintiff asserts (Br. 16-17) that because of the Government's right to abandon there was no taking until the declaration of taking was filed. Since the complaint does not allege any governmental acts prior to February 9, 1943, and the dismissal of the complaint was not based on such grounds, it would be premature at this time to discuss the question whether because of earlier acts the limitation period commenced prior to February 9, 1943, and, of course, that question will never be reached if, as we believe, the dismissal of the complaint was correct.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be affirmed.

Respectfully,

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APPENDIX

The pertinent provisions of the Street Improvement Act of April 7, 1911, Cal. Stats. 1911, c. 397, p. 730, *et seq.*, as amended Cal. Gen. Laws (Deering, 1931) Act 8199, are as follows:

§ 20. Assessment for street improvement. The expenses incurred for any work authorized by this act * * * shall be assessed upon the lots and lands fronting thereon, except as otherwise in this act specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage, at a rate per front foot sufficient to cover the total expense of the work. [Amendment approved June 14, 1929; Stats. 1929, p. 1656.] Cf. Cal. Sts. & H. C. sec. 5315.¹¹

§ 20i. Diagram of property affected. Whenever the resolution of intention declares that the cost and expenses of the work and improvement are to be assessed upon a district, the city engineer shall prior to completion of the contract make a diagram of the property affected or benefited by the proposed work or improvement, as described in the resolution of intention, and to be assessed to pay the expenses thereof. Such diagram shall show * * *. [New section added June 14, 1929; Stats. 1929, p. 1660.] Cf. Cal. Sts. & H. C. secs. 5341-5343.

§ 22. Warrant. To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets, and countersigned by the mayor of said city. The said warrant shall be substantially in the following form:

Form of Warrant

By virtue hereof, I (name of the superintendent of streets), of the city of —, county of — (or city and county of —), and state of California, by virtue of the authority vested in me

¹¹ For the convenience of the court, reference will be made to the corresponding provisions in the present law which are found in the California Streets and Highways Code. However, no attempt will be made to indicate how, if at all, the sections may have been changed.

as said superintendent of streets, do authorize and empower (name of contractor) (his or their) agents or assigns, to demand and receive, the several assessments upon the assessment and diagram hereto attached and this shall be (his or their) warrant for the same. * * * [Cf. Cal. Sts. & H. C. sec. 5371.]

§ 23. Recording and delivery of warrants, etc. Said warrant, diagram and assessment, shall be recorded in the office of said superintendent of streets. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portion of lots assessed, respectively, and such lien shall so continue until it be discharged of record. Such lien shall be subordinate to all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property; and from and after the date of said recording of any warrant, assessment and diagram, all persons shall be deemed to have notice of the contents thereof. After said warrant, assessment and diagram are recorded, the same shall be delivered to the contractor, or his agent, or assigns, on demand, but not until after the payment to the said superintendent of streets of the incidental expenses not previously paid by the contractor, or his assigns; and by virtue of said warrant said contractor, or his agents or assigns, shall be authorized to receive the amount of the several assessments made to cover the sum due for the work specified in such contract and assessments. [Amendment approved May 24, 1927; Stats. 1927, p. 1407.] Cf. Cal. Sts. & H. C. sec. 5372-5374.

§ 37. Records of street superintendent. The superintendent of streets shall keep a public office in some convenient place within the municipality, and such records as may be required by the provisions of this act. The records so kept and signed by him, shall have the same force and effect as other public records, and copies therefrom duly certified,

may be used in evidence with the same effect as the originals. The said records shall, during all office hours, be open to the inspection of any person wishing to examine them, free of charge. [Cf. Cal. Sts. & H. C. sec. 5680.]

§ 59. Serial bonds may be issued. The city council of any municipality in this state shall have the power, in its discretion, to determine that serial bonds shall be issued in the manner and form hereinafter provided to represent assessments of twenty-five dollars or over for the cost of any work or improvement authorized in Part I of this act. [Cf. Sts. & H. C. sec. 6400.]

§ 60. Life of bonds. Said serial bonds shall extend over a period not to exceed fourteen years from the second day of January next succeeding fifteenth day of the next November following their date, and an even annual proportion of the principal sum thereof shall be payable, by coupon on the second day of January every year after the fifteenth day of the next November following their date, until the whole is paid; * * * and the interest shall be payable semi-annually, by coupon, on the second days of January and July, respectively, of each year after their date, at the rate of not to exceed ten per cent per annum on all sums unpaid, until the whole of said principal and interest are paid. Upon such bonds dated after the fourteenth day of May of any year and on or before the fourteenth day of the following November the first interest coupon on said bonds shall become due and payable on the second day of the next succeeding January * * * .

Bonds: where paid. Said bonds and interest thereon shall be paid at the office of the city treasurer of said municipality, who shall keep a fund designated by the name of said bonds, into which he shall place all sums paid him for the principal of said bonds and the interest thereon, together with all penalties thereon, and from which he shall disburse such sums, upon the presentation of said coupons; and under no circumstances shall said

bonds or the interest thereon be paid out of any other fund. Said city treasurer shall keep a register in his office, which shall show the series, number, date, amount, rate of interest, payee and indorsees of each bond, and the number and amount of each coupon of principal or interest paid by him and shall cancel and file each coupon so paid. [Amendment approved June 12, 1931; Stats. 1931, p. 1576.] Cf. Sts. & H. C. secs. 6424-6425; 6462-6463.

§ 62. Unpaid assessments and interest. * * * Should any payment of principal of said unpaid assessments or of interest thereon be not paid on the date upon which the coupon or coupons representing it are payable, the city treasurer shall after the close of business on said due date add to the amount of principal or interest so delinquent a penalty of five per cent of the total amount of such delinquency, and at the beginning of the business on the first day of each succeeding month until such delinquent payment and all penalties thereon be fully paid, he shall add an additional penalty of one per cent of the amount of such delinquency, and said treasurer shall collect such penalties with and as a part of such delinquent payments.

Notice to owners. The city treasurer shall at least fifteen days before each respective fifteenth day of May and November, until said assessment be paid in full, mail, postage prepaid, to each owner of property described in said assessment, at his last known address, as appears upon the tax rolls of said city, a postal card notifying him of the amount due and the date when payment is due from him on said assessment and stating that said payment is subject to penalty if not paid on or prior to the due date of the coupons. Provided, that the failure of the city treasurer to mail said cards or the failure of the property owner to receive the same shall in nowise affect the validity of any penalty or invalidate any act or proceeding. [Amendment approved May 24, 1927; Stats. 1927, p. 1410.] Cf. Sts. & H. C. secs. 6442-6443.

§ 63. Street improvement bonds. Form of bond. The city treasurer shall upon the filing of said list, make out, sign, and issue to the contractor, or his assigns, payee of the warrant and assessment, a separate bond, representing upon each lot or parcel of land upon said list the total amount of the assessment against the same, as thereon shown, where the unpaid assessment or the unpaid remainder thereof amounts to twenty-five dollars or over. * * *

Form of bond.

Said bond shall be substantially in the following form:

STREET IMPROVEMENT BOND

Series (designating it), in the city (or other form of the municipality) of (naming it).

\$—100

No. —

Under and by virtue of an act of the legislature of the state of California (title of this act), I, out of the fund for the above designated street improvement bonds, series — will pay to —, or order, the sum of — dollars, (\$—) with interest at the rate of — per cent per annum, all as is hereinafter specified, and at the office of the — treasurer of the —, of —, state of California.

This bond is issued to represent the cost of certain street work upon —, in the — of —, as the same is more fully described in assessment number — issued by the street superintendent of said —, after the acceptance of said work, and recorded in his office. Its amount is the amount assessed in said assessment against the lot or parcel of land numbered therein, and in the diagram attached thereto, as number —, and which now remains unpaid, but until paid, with accrued interest, is a lien upon the property affected thereby, as the same is described herein and in said recorded assessment with its diagram, to wit: the lot or parcel

land in said — of —, county of —, state of California, —.

This bond is payable exclusively from said fund, and neither the municipality nor any officer thereof is to be holden for payment otherwise of its principal or interest. The term of this bond is — years from the second day of January next succeeding the fifteenth day of the next November following its date, and at the expiration of said time the whole sum then unpaid shall be due and payable; but on the second day of January of each year, following the fifteenth day of the next November, after its date, an even annual proportion of its whole amount is due and payable, upon presentation of the coupon therefor, until the whole is paid, with all accrued interest at the rate of — per centum per annum.

The interest is payable semi-annually, to wit: on the second days of January and of July in each year hereafter, upon presentation of the coupons therefor, hereto attached, the first of which is for the interest from date to the next second day of —, and thereafter the interest coupons are for semi-annual interest.

Redemption of bond. This bond may be redeemed by the owner or any person interested in any lot or parcel of land described herein, in the manner provided in said act, at any time before maturity, and before commencement of proceedings for sale, upon payment to the city treasurer, for the holder of this bond, of the amount then unpaid on the principal sum thereof, with interest thereon calculated up to the due date of the next maturing interest coupon, and all penalties accrued and unpaid, together with interest for six months at the rate named in said bond.

Default in payment of principal or interest. Should default be made in the annual payment upon the principal, or in any payment of interest from the owner of said lot or parcel of land, or anyone in his behalf, the holder of this bond is entitled to declare the whole unpaid amount to be due and pay-

able, and to have said lot or parcel of land advertised and sold forthwith, in the manner provided by law. In case of such default, there shall be immediately added to such defaulted amount, five per cent of the amount thereof, and on the first day of each month following such default there shall be added a further penalty of one per cent of such defaulted amount. The city shall be entitled to one-half the penalty first imposed, namely, two and one-half per cent and the other two and one-half per cent and all subsequent penalties shall be paid to the holder of the bond along with and as a part of such defaulted payment.

At said — of —, this — day of —, in the year one thousand — hundred and —.

City treasurer of the — of —.

[Amendment approved May 9, 1923; Stats. 1923, p. 278.] Cf. Sts. & H. C. sec. 6460.

§ 66. To whom payable. Coupons. Record of bonds. The bonds so issued by said treasurer shall be payable to the party to whom they issue, or order, and shall be serial bonds, as is hereinbefore described, and shall bear interest at the rate specified in the resolution of intention to do said work. They shall have annual coupons attached thereto, payable in annual order, on the second day of January of every year after the fifteenth day of the next November following the date of the bond, until all are paid, and each coupon shall be for an even annual proportion of the principal of the bond. They shall have semi-annual interest coupons thereto attached, as set forth in section sixty hereof. The city treasurer shall, in addition to his other duties in the premises, keep a record of all bonds issued by him, of all payments on said bonds with the dates thereof and of all penalties accruing thereon; and he shall report all payments of coupons or penalties upon said bonds, with the dates thereof, to the street superintendent, who shall forthwith indorse the same upon the margin of the record of the assessment to

the credit of which the same are paid, and said assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, and the accrued interest thereon and the penalties, if any, shall be fully paid according to the terms thereof. Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under this act. [Amendment approved May 9, 1923; Stats. 1923, p. 280.] Cf. Sts. & H. C. secs. 6427, 6445, 6446, 6461.

§ 67. Penalty for nonpayment. Whenever payment either upon the principal, or of the interest upon any bond issued hereunder has not been, or shall not be made when the same has become, or shall become due, and the holder of the bond demands in writing that the city treasurer proceed to advertise and sell the lot or parcel of land described by said bond as being that upon which the assessment represented by said bond was levied, then said treasurer shall proceed as provided in the next section. [Amendment approved May 23, 1921; Stats. 1921, p. 293.] Cf. Sts. & H. C. sec. 6500.

§ 76. City treasurer to list properties on which taxes are unpaid. Tax collector's notice. Form of notice. It shall be the duty of the city treasurer one (1) month prior to the date it is provided by ordinance or charter of the municipality that taxes are due, or in case taxes are collected by the county for the city on or before the fourth Monday in September of each year, to certify to the city tax collector or in case the city taxes are collected by the county, to the county tax collector, a list of the properties within said city, upon which any payment either of principal or of interest has not been paid when due upon any bond issued under part three of this act. The tax collector shall cause to be pasted or attached to or stamped or printed upon the tax bill or tax receipt a notice which shall in substance be as follows: * * * . [Amendment approved June 6, 1929; Stats. 1929, p. 1306.] Cf. Sts. & H. C. secs. 6590-6593.

§ 76a. Foreclosure of bonds. Form of demand for payment. In the event of the nonpayment of any installment of the interest or principal and by way of a separate, distinct and cumulative remedy, the holder of any bond upon which any payment either upon the principal or of the interest has become delinquent may, at any time after three months after the date it is provided by ordinance or charter of said city that taxes are due, or in case taxes are collected by the county for the city at any time after four (4) months next succeeding the fourth Monday of September, following the date of delinquency of principal or interest and prior to the expiration of four (4) years after the due date of the last installment upon any bond or of the last principal coupon attached thereto, file and maintain a suit to foreclose the lien of the bond and recover the amount due thereon; provided, however, that suit may be brought at any time following the expiration of thirty (30) days after the service of personal demand for payment as herein provided upon the owner of the premises. [New section added June 6, 1929; Stats. 1929, p. 1306.] Cf. Cal. Sts. & H. C. sec. 6610.

Section 330 of the California Code of Civil Procedure provides as follows:

[Time for sale under public improvement assessment lien.] In all cases in which there is now vested or there shall hereafter be vested in a treasurer, street superintendent, or other public official the power to sell at public auction, after demand upon him by the holder of any public improvement bond, any lot or parcel of land upon which exists or which shall hereafter exist a lien to secure the payment of a public improvement assessment represented by said bond, and the act or law establishing such power fails to prescribe the time within which such official may act, said official may sell at any time prior to the expiration of four years after the due date of said bond or of the last installment thereof or of the last principal coupon attached thereto, or prior to

January 1, 1947, whichever is later, but not thereafter. This section is not intended to extend, enlarge or revive any power of sale which has heretofore been lost by reason of lapse of time or otherwise. [Added by Stats. 1945, ch. 360, § 1.]

Section 2911 of the California Civil Code provides as follows:

[Extinguishment by lapse of time: Presumption as to improvement liens.] A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, either:

1. An action can be brought upon the principal obligation, or

2. A treasurer, street superintendent or other public official may sell any real property to satisfy a public improvement assessment or any bond issued to represent such assessment and which assessment is secured by a lien upon said real property; whichever is later.

Anything to the contrary notwithstanding, any lien heretofore existing or which may hereafter exist upon real property to secure the payment of a public improvement assessment shall be presumed to have been extinguished at the expiration of four years after the due date of such assessment or the last installment thereof, or four years after the date the lien attaches, or on January 1, 1947, whichever is later, or in the event bonds were or shall be issued to represent such assessment, the lien shall then be presumed to have been extinguished at the expiration of four years after the due date of said bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later. The presumptions mentioned in this paragraph shall be conclusive in favor of a bona fide purchaser for value of said property after such dates. [Enacted 1872; Am. Stats. 1945, ch. 361, § 1.]

